UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

ERIC ARRANA-GARCIA,	)	
	)	
Movant,	)	
	)	
v.	)	Case No. CV416-120
	)	CR413-161
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Having pled guilty to conspiracy to possess with intent to distribute and to distribute 50 grams or more of methamphetamine; distribution of five grams or more of meth; and using and carrying a firearm during and in relation to a drug trafficking crime, (doc. 103 (plea agreement),[1] doc. 105 (judgment) (entered January 23, 2014)), Eric Arrana-Garcia moves under 28 U.S.C. § 2255 to vacate his carrying conviction. Doc. 112. Review of the parties' briefing shows that his motion must be denied.

After the Court sentenced him to 216 months' imprisonment on

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[1] All citations are to the criminal docket unless otherwise noted and all page numbers are those imprinted by the Court's docketing software.

January 12, 2015 (doc. 105), Arrana-Garcia never appealed. His conviction thus became final on January 26, 2015. Fed. R. App. P. 4(b)(1)(A) (criminal defendants must file a notice of appeal within 14 days of the entry of judgment). He filed the instant § 2255 motion approximately one year and four months later. Doc. 112 at 2 (signature-filed May 19, 2016). In it he argues that *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015), voids his 18 U.S.C. § 924(c) conviction for carrying a firearm during and in relation to a drug trafficking crime. Doc. 112 at 4.[2]

The Armed Career Criminal Act ("ACCA") -- the statute *Johnson* addressed -- provides enhanced penalties for defendants who are (1) convicted of being felons in possession of firearms in violation of 18 U.S.C. § 922(g) and (2) have "three prior convictions . . . for a violent felony or a serious drug offense, or both." It defines "violent felony" as,

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[2] In a reply to the Government's response, Arrana-Garcia abandons his *Johnson* argument and, for the first time, argues that something about the phrase "brandished a firearm" constitutes a "lie[] . . . fed to the understanding of an under privileged member of a minority, the Petitioner." Doc. 115 at 4. He also contends that his attorney provided ineffective assistance by not fully explaining his plea agreement and threatening him if failed to sign it. *Id.* In addition to lacking all merit, those claims are time-barred. *See infra.*

among other things, a felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at § 924(e)(2)(B). *Johnson* found that "residual" clause so vague that it violates due process. *See* 135 S. Ct. at 2557. Importantly, it said nothing about "serious drug offenses," which remain a valid basis for ACCA enhancements. *See id.* at 2563 ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony," much less its definition of "serious drug offense").

Even assuming it applies at all to § 924(c),[3] *Johnson* provides Arrana-Garcia no succor here. Under that provision, a person cannot use or carry a firearm during or in relation to "any crime of violence *or* drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) (emphasis added). Although one clause of its crime of violence definition reads similarly (though not identically) to ACCA's residual clause (and thus *Johnson*'s logic may well

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[3] Some courts have found that it does. *See, e.g.*, *United States v. Baires-Reyes*, 2016 WL 3163049 at * 5 (N.D. Cal. June 7, 2016) (finding that § 924(c)'s residual clause is unconstitutionally vague). In this circuit it remains an open question. *See In re St. Fleur*, ___ F.3d ___, 2016 WL 3190539 at * 3 (11th Cir. June 8, 2016).

apply), Arrana-Garcia committed a drug trafficking offense. As the Government aptly put it, "*Johnson* has no conceivable application in that context." Doc. 114 at 3.

Recall that *Johnson* says nothing about the viability of "serious drug offense"[4] predicates. *See* 135 S. Ct. at 2563. The term "drug trafficking crime" in § 924(c)(1)(A) covers similar ground as that ACCA phrase.[5] And just as *Johnson*'s logic failed to implicate drug offenses in the ACCA context, so too does it not apply to "drug trafficking crimes" for purposes of § 924(c).

It follows that Arrana-Garcia cannot look to *Johnson* and § 2255(f)(3) to define when his one-year statute of limitations began to run. Instead, he's relegated to § 2255(f)(1), which dictates that the clock started the day his conviction became final (January 26, 2015). Time

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[4] Under ACCA, "serious drug offense" means, among other things, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

[5] "Drug trafficking crime" under § 924(c)(2) "means any felony punishable under the Controlled Substances Act."

expired on January 26, 2016, so his motion is untimely by several months (he did not file it until May 19, 2016, doc. 112 at 13).[6]

Accordingly, Eric Arrana-Garcia's § 2255 motion should be **DENIED**. Applying the Certificate of Appealability (COA) standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb.9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue either. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2255 ("The district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant.") (emphasis added). Any motion for leave to appeal *in forma pauperis* therefore is moot.

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[6] Equitable tolling can, in exceptional circumstances, allow untimely motions to proceed. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). So can a "'fundamental miscarriage of justice'" that "'has probably resulted in the conviction of one who is actually innocent.'" *Fail*, 2016 WL 1658594 at * 4 (quoting *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013)). Arrana-Garcia invokes neither tolling nor the miscarriage exception, and offers no new evidence or exceptional circumstances to trigger either.

SO REPORTED AND RECOMMENDED, this 9th day of August, 2016.

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA